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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE L. PEREZ, et al.,

Defendants and Appellants.

B209761

(Los Angeles County  
Super. Ct. No. BA 287120)

APPEALS from judgments of the Superior Court of Los Angeles County.  
Craig E. Veals, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant  
and Appellant Jose L. Perez.

Nancy Mazza for Defendant and Appellant Arturo Bernal.

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Respondent.

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Defendants Jose L. Perez<sup>1</sup> and Arturo Bernal timely appealed from their convictions for second degree murder. The jury found true gang and firearm enhancements (for personal and principal use and discharge of a firearm causing death). The court sentenced both defendants to 40 years to life. Defendants (who joined each other's briefs) raise several issues, including claims of errors relating to the gang enhancement. We affirm.

## **FACTUAL BACKGROUND**

### **I. The Shooting**

In the early morning hours of February 7, 2003, Gloria Perez, the manager of an apartment building at Magnolia and 8th Street in Los Angeles, heard gunshots and men running down the stairs from the roof and out into the street. Gloria did not see any of the men's faces. Later that morning, Gloria went to the roof and found a body. Gloria later identified Jose Perez as someone who had visited a member of MS (the Mara Salvatrucha gang) living at the complex.

Cesar Ramos, a resident of the building, saw a number of people, including Jose Perez, running down the stairs. Ramos had seen Perez before and was able to identify Perez from a photo array. No eyewitness identified Bernal. None of the fingerprints found at the scene matched either defendant.

The victim died from three gunshot wounds.

Ballistics testing reflected the bullet recovered from the roof was fired from the same firearm as the bullet recovered intact during the autopsy. Both bullets, as well as all the cartridge casings recovered at the scene, were .32 caliber. The firearms expert could

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<sup>1</sup> The information named Jose Luis Perez, and he was referred to by that name throughout the trial; late in the proceedings, he stated his correct true name is Jorge Ricardo Ventura Hernandez.

not conclusively determine whether the cartridge casings were fired from the same firearm or from two or more firearms.

## **II. Gang Evidence**

Defendants were members of MS. Leeward is a clique within MS, and the scene of the murder was within Leeward territory. Both defendants considered themselves “shot callers,” i.e., individuals with authority in the gang. The Drifters gang had territory south of Leeward, and Leeward did not get along with the Drifters. An MS member would use the derogatory term “downfall” to refer to a Drifters member and would consider any Drifters member an enemy.

Officer Matthew Zeigler, the prosecution gang expert, opined that a Drifters who entered Leeward territory would be beaten at the very least. MS gang members are obligated to confront rival gangsters who enter MS territory; the rival could be beaten or killed. It is possible for an outsider to gain permission to enter Leeward territory to transact business, but he would have to act respectfully and “walk softly.” If the outsider acted disrespectfully to MS members while in MS territory, there would be even more reason for MS members to mete out retribution in order to avoid looking weak in the community.

When a gangster commits a violent act, it enhances his reputation within the gang and acts to intimidate the community, thereby reducing resistance and cooperation with authorities. Because violent acts increase a member’s status, a member would seek credit for such an act. Taking credit for an act that a member did not actually commit would be disrespectful to the gang and could result in physical punishment.

## **III. Taped conversation**

Jorge Pineda (known as Dopey) had been a member of Leeward for eight or nine years and had been in a leadership position with MS from 2002 until 2004. Pineda

decided to stop gang life as he did not want to spend the rest of his life in jail and turned his life to Christ. In 2000, Pineda was contacted by the FBI and started giving the FBI information about the criminal activities of MS. Pineda was personal friends with two of the top MS leaders. Pineda recorded many conversations with gang members; he only recorded the shot callers and leaders. Pineda assisted the FBI for four years. Pineda knew Perez as a leader from the Leeward clique and recorded some 5 to 15 calls with him.

In a taped telephone conversation<sup>2</sup> among Pineda, Bernal (known as Little Smiley) and Perez (known as Cashy), the subject of Bernal's taking over a gang area in Texas for MS was discussed. Perez advocated to Pineda that Bernal be given permission to take over the area. Pineda gave defendants advice on how to approach Bernal's meeting with the Texas gangsters.

Perez explained how he had acted coolly to avoid a possible confrontation between Bernal and someone in a 7-Eleven that would have resulted in a serious crime where video cameras were present and police were nearby. That incident was offered as an example of how Perez and Bernal were willing to do a "job" in the open and Perez had acted responsibly. At that point Perez referred to the instant crime as an example of how he and Bernal had done "other crazy shit, other work" in the past. Perez told Pineda, "I got that dude good. Ask Little Smiley. Little Smiley did him." At that point, there were what sounded like giggles on the recording.

Perez explained how Gato from the Drifters gang had "without thinking" come into Leeward, which is rival gang territory, to buy drugs. In response, Pineda said, "he already crossed the fine line." To which Perez replied, "Yeah, right." Perez told Pineda that he (Perez) had done a good thing and asked Bernal to confirm it. Bernal said, the victim was acting aggressively and pushing everyone. Perez described how he led the

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<sup>2</sup> The recorded call, which was conducted in Spanish, was marked as Exhibit 29. A certified translation was distributed to the jury as Exhibit 30. The court instructed the jury to use the translation.

victim up on the roof, and how he and Bernal did good. Gato began smoking a “primo” cigarette (a marijuana cigarette laced with rock cocaine).

Bernal interjected how he told Tiny, another MS gang member, that ““this fool is from Downfall.”” As the men were smoking drugs and drinking beer on the roof, Tiny approached Gato and said, ““So you’re Gato from Downfall?”” Gato responded, “What do you mean, dude?!” and was “all mad.” Tiny then “socked” Gato, and when Gato was getting up, Perez told everyone to “[m]ove away.” Perez then “put a piece of metal in his head . . . bang, bang, bang.” “And when he was about to hit the ground, Little Smiley was coming and . . .with his: bang, bang, bang[.] Just because he is stubborn, Bro.” At that point, there was more giggling.

Bernal told Pineda that he (Bernal) went back to the scene some three hours later and searched the victim and took the victim’s money and drugs. Bernal then went and partied using the victim’s money and drugs. Bernal told Pineda how he realized after the fact “when this work happened, dude, and we ran, dude, and all the bottles were still up there, dude.” Bernal said, ““Fuck, fucking shit.”” Pineda realized Bernal’s concern and said, “[t]he fingerprints.” Bernal responded, “Yeah, dude.”

Perez related how Gato had not wanted to share his drugs, which angered Perez, but he did not know if that was what “threw [him] off.” Perez stated he turned into an animal. After the killing, some of Perez’s fellow gang members were upset because of “heat” from police that the shooting brought on the neighborhood. Perez responded, ““Fuck you, he was an enemy.”” A woman from Leeward, who had a brother in the Drifters, told Perez, ““Fuck, they just killed a *veterano* . . . from Drifters.”” (Original italics) The Drifters were “all bummed out” about the shooting and held a big meeting in response.

Pineda understood from his conversation with defendants that both Perez and Bernal were taking credit for the killing of Gato. Pineda testified that killing an outsider was part of the MS Leeward code of conduct. It was significant that Gato was from a rival gang because it was an MS member’s obligation to confront the rival when he came

into MS territory. Any outside gang member who entered MS territory would be subject to being killed. A major tenet of the gang was that outsiders could not be given permission to enter MS territory. MS controls the sale of drugs in its territory; money from drug sales is used to purchase guns; and no one else can sell drugs in MS territory without being punished.<sup>3</sup>

## **DISCUSSION**

### **I. Gang Evidence**

#### **A. Intent to Benefit The Gang**

Officer Zeigler opined the shooting benefitted the gang because it created an atmosphere of intimidation in the community, elevated the member's status, earned respect for the member and dissuaded community members from getting involved, and, even if the rival was in MS territory to purchase drugs, the shooting was done for the gang -- to protect the neighborhood and ensure the gang was respected. Zeigler further opined that if a rival came into MS territory to buy or sell drugs without authority, he would at least be beaten up. A rival in MS territory must be polite and respectful. A member of MS is obligated to confront any rival who comes into MS territory without authority and would be obligated to beat up or kill that person. Pineda corroborated the shooting was gang-related because the victim was from a rival gang, stating that if a rival comes into your territory, a gang member has to jump or kill that person or die.

“““In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”” We presume in support of the judgment

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<sup>3</sup> Several times in Bernal's brief, he refers to the testimony of gang member Jose Gonzales. Gonzales did not testify; he was identified as a shot caller by Zeigler. The testimony Perez cites as being by Gonzalez was actually by Zeigler.

the existence of every fact that could reasonably be deduced from the evidence. We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support’” the conviction or the enhancement.”

(Citations omitted.) (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508.)

Appellants contend there was insufficient evidence the shooting was done with the specific intent to benefit the gang as the expert’s opinion was contradicted by Perez’s confession that he shot the victim for a personal reason, i.e., the only reason he shot the victim was because the victim would not share a joint. Appellants argue the facts here are not similar to those in *People v. Gardeley* (1996) 14 Cal.4th 605, 619, a classic case for how a gang uses violence.

Appellants note the shooting was not in public view, the presence of drugs and beer supports the inference appellants invited the victim to smoke and drink, arguing it was a social gathering and the men were partying and not engaged in gang activities. Appellants further argue the victim was not attacked because appellants wanted to warn the neighborhood and note they only claimed credit years later to impress a higher up. Appellants insist the victim was not shot because he was a rival and there was no indication of any animosity because the victim was a rival or that they considered the victim’s entry into their territory a challenge.

Appellants focus on one factor not the entire milieu of the shooting. Perez stated he shot the victim because the victim would not share a joint, but he also stated he shot the victim because the victim was an enemy. The shooting occurred in Leeward territory, at an apartment building where Leeward members hung out, and the victim was from a rival gang. Officer Zeigler, the gang expert, testified about the obligation of gang members with respect to a rival coming into their territory, i.e., to confront the rival who could be beaten or killed. Pineda corroborated that killing an outsider was part of the Leeward code of conduct. The victim disrespected appellants and pushed them around. Tiny challenged the victim. Bernal called the victim, “Downfall,” a derogatory term.

In the recorded conversation, Pineda referred to the victim's having crossed "the fine line" into Leeward territory. Perez and Bernal referred to the murder as "work," a gang term, and indicated they had performed in a positive manner and offered the incident as a reason why Bernal should be given the Texas territory. Taking credit for the killing was consistent with gang culture. The gang community believed the shooting was for gang purposes. The expert provided the context for the killing. The jury could reasonably infer that appellants lured the victim up onto the roof and that the victim's refusal to share the joint was the excuse for the shooting. Thus, substantial evidence supports the inference the killing was to benefit the gang.

## **B. Specific Intent**

Appellants contend the court erred by permitting expert opinion on the specific intent of the shooter because of the inflammatory and prejudicial nature of gang evidence. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) Citing *People v. Bojorquez* (2002) 104 Cal.App.4th 335 and other cases, appellants posit the expert gave an opinion on the ultimate issue of whether they shot the victim with the specific intent to benefit the gang.

In *Killebrew*, the court noted that expert testimony about the culture and habits of criminal street gangs could include testimony about "whether and how a crime was committed to benefit or promote a gang." (*People v. Killebrew, supra*, 103 Cal.App.4th at pp. 656-657.) The expert testified that each of the individuals in three cars knew there was a gun in each of two cars and jointly possessed the gun with every other person in all three cars for their mutual protection. (*Id.*, at p. 658.) The court determined the testimony in that case was improper opinion on the ultimate issue because the expert testified as to the subjective knowledge and intent of each occupant of each vehicle rather than about the expectations of gang members in general when confronted with a specific action. (*Ibid.*) In *Bojorquez*, the court determined the trial court abused its discretion by

admitting wide-ranging testimony about the criminal tendencies of gangs, but the case did not involve a gang allegation. (*People v. Bojorquez, supra*, 104 Cal.App.4th at pp. 342-345.)

In the case at bar, Zeigler testified about gang culture in general and not the specific intent of the shooters and responded to hypothetical questions. When asked if he would change his opinion the killing was for the benefit of the gang because it was a dispute over drugs, Zeigler stated: “If it was over a drug deal it was over a gang-related type of crime. Especially if you have someone disrespecting another during a drug deal, and if MS does not act on it, it is going to make them look weak and lose credibility in the street.” Zeigler also opined that even if the rival was in MS territory to purchase drugs, the shooting was done for the gang, to protect the neighborhood and see the gang was not disrespected. His testimony helped explain why a killing occurred for such a slight as not sharing a joint. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) Zeigler did not offer an opinion on the specific intent of appellants.

## **II. Adoptive Admissions**

### **A. The Taped Admissions**

During the taped conversation, Perez would make a comment and then ask Bernal for confirmation. Bernal would correct Perez if Perez was wrong. For example, Perez initially stated the shooting in question occurred in 2001. Bernal corrected Perez that it was in 2002. Just prior to the references to the instant murder, Perez related how Bernal had put a gun to the head of someone in a 7-Eleven, and Bernal boasted to Pineda that he (Bernal) had been prepared to kill that victim “right out in the open.” Immediately after Bernal confirmed that incident, Perez told Pineda, “Look, we done other crazy shit, other work. Look, at other crazy shit we’ve done. A dude from Drifters . . .” Perez described the victim in the instant killing and said, “Okay, then, I got that dude good. Ask Little Smiley. Little Smiley did him. . . .” The sound of giggling is heard.

Those two comments were made seconds apart. Bernal went on to badmouth the victim and justify the killing because the victim was being disrespectful by “pushing everybody” and telling them to “get out of the way.” There was some more discussion about what year the killing took place, and Perez concluded he did not know when it occurred, “but Little Smiley and me did good.” Bernal said, “this was around 2003, dude. ¶ . . . around the end of 2002, dude.” Bernal then described how he had identified the victim as being from “Downfall” to Tiny, another gang member, and the location of the killing. Perez told of how Tiny had confronted the victim by saying, “‘So you’re Gato from Downfall?’” That made the victim mad, and Bernal confirmed what Perez said by saying, “yeah.”

Perez described how Tiny “socked” the victim, and Perez told everyone to “[m]ove away” before he shot the victim in the head, “And when he was about to hit the ground, Little Smiley was coming and . . . with his: bang, bang, bang[.] Just because he is stubborn, Bro.” (More giggling is heard). Bernal related how he had remembered they had left bottles on the roof and told Pineda, “And, and, look, dude, when this work happened, dude, and we all ran, dude, and all the bottles were still up there, dude. ¶ . . . And I said ‘Fuck, fucking shit!’ I said.” Pineda realized Bernal was talking about fingerprints that would have been left on the beer bottles.

## **B. Adoption**

The jury was instructed with CALJIC No. 2.71.5, which provides in part: “Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that a defendant’s silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.”

“‘Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.’ (Evid. Code, § 1221.) Under this provision, ‘If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.’ ‘For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.’ ‘When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party’s reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.’” (Citations omitted.) (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Bernal contends it was an error to admit the taped conversation as an adoptive admission as to him because it was unreliable and because of the ambiguity of his responses. Noting the jury read a translated version of the conversation and did not listen to the actual conversation, Bernal argues that under the totality of the circumstances, the court should have concluded he did not adopt the admission as the recording was instigated at the direction of the FBI by an informant who had a motive to interpret the statements as incriminating and no legal training to opine if the statements were admissions and some of the facts were not true. Moreover, the purpose of the call was to discuss his running a Texas gang and not to report the murder, both he and Perez had motive to exaggerate, with Perez being the main braggart, a lot of the tape was unintelligible, and there were interruptions and Perez did a lot of talking without giving him a chance to talk so one cannot say he had the opportunity to deny the statements.

Those are all fact questions for the jury. (See *People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1190 [“To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant’s conduct actually constituted an adoptive admission becomes a question for the jury to decide.”].)

Bernal notes he did not specifically state he shot the victim. When Perez states that Bernal “did him,” Bernal giggled. When Perez states he and Bernal did good, Bernal’s response is unintelligible. When Perez directly stated he shot the victim and then Bernal shot him, appellant said, “But look, dude, look.” Bernal argues that none of those responses constituted an agreement with what Perez had said.

It was for the jury to decide if the giggling, which could reasonably be inferred was by Bernal as it was a three way conversation, and his concern about the fingerprints as well as his admission he had identified the victim as being from “Downfall” and his confirmation of Tiny’s action as being an admission he also shot the victim. Bernal was continuing the story rather than denying it to bolster his credibility to a higher up who was advising Bernal about how to get the Texas spot.

Bernal asserts the statements were suspect because they were made by an accomplice and not under oath or tested by cross-examination. Citing *Ohio v. Roberts* (1980) 448 U.S. 56, 66, 72 and *Crawford v. Washington* (2004) 541 U.S. 36, 56, Bernal also posits that when there is an implied adoption, the People should be held to the standard of trustworthiness. The California Supreme Court determined there is no violation of a defendant’s right to confrontation once a defendant expressly or impliedly adopts the statement of another because the statements become his own admissions and are admissible on that basis as an exception to the hearsay rule. (*People v. Silva* (1988) 45 Cal.3d 604, 624.) The use of adoptive admissions does not implicate the Sixth Amendment right to confrontation under *Crawford*. (*People v. Castille* (2005) 129 Cal.App.4th 863, 877-878; *People v. Combs* (2004) 34 Cal.4th 821, 841-842.)

### **C. Corroboration**

Bernal further contends the court erred by not instructing (with CALJIC Nos. 3.11 and 3.12) the accusation needed corroboration. Bernal suggests he was convicted on the word of an accomplice. When necessary, the court is required to instruct the jury pursuant to Penal Code section 1111 which prohibits conviction on the testimony of an accomplice unless the testimony is corroborated by other evidence connecting the defendant to the commission of the crime. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271.) Bernal asserts that although the admissions were not received for the truth, the truth had to be determined by the jury so that a fair interpretation was the admissions were used as substantive evidence of guilt and therefore had to be corroborated.

In the case at bar, Perez did not testify against Bernal; rather Bernal adopted admissions made by Perez. Thus, he was convicted by his own admission and not those of an accomplice so no instruction on corroboration was necessary. Bernal cites no cases holding admissions need corroboration.

### **III. Personal Use of Firearm**

Appellants contend the People failed to provide sufficient evidence relative to the personal use enhancement as the only evidence of personal use was the conversation, which they claim was insufficient evidence. In the taped recording, Perez stated he put metal to the victim's head and Bernal was coming with his "bang, bang, bang"; the jury could have reasonably inferred Bernal also shot the victim. (*People v. Vy, supra*, 122 Cal.App.4th at p. 1224.)

#### **IV. Cumulative and Constitutional Error**

Appellants claim that each error resulted in a denial of their constitutional right to due process and that cumulative error requires reversal of their convictions. As we have determined there was no error, appellants were not denied their right to due process or prejudiced by cumulative error.

#### **V. Courtroom Security**

Appellants contend they were prejudiced by the increase in law enforcement personnel in the courtroom during Pineda's testimony. Both in the trial court and on appeal, appellants argued the presence of the additional officers sent a message Pineda, the key witness, needed to be protected from them and might have affected the reasoning of the jurors or impacted them psychologically. Appellants claim there was no justifiable reason for the additional security, which usually must be based on specific threats or prior disruption in the courtroom and neither existed here.

"Other security measures [than physical restraint], however, may not require such justification, and reside within the sound discretion of the trial court. We explained, for example, that the presence of armed guards in the courtroom would not require justification on the record '[u]nless they are present in unreasonable numbers.' The United States Supreme Court also distinguishes between security measures, such as shackling, that reflect on defendant's culpability or violent propensities, and other, more neutral precautions. Measures such as shackling or the appearance of the defendant in jail garb are inherently prejudicial and are subject to exacting scrutiny, but precautions such as the use of additional armed security forces are not, because of 'the wider range of inferences that a juror might reasonably draw from the officers' presence.' The court explained: 'While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a

defendant's trial need not be interpreted as a sign that [defendant] is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.' Accordingly, the court concluded, the presence of such guards is not inherently prejudicial, and their appearance at the defendant's trial will be reviewed on a case-by-case basis to determine whether the defendant actually was prejudiced."

(Citations omitted.) (*People v. Jenkins* (2000) 22 Cal.4th 900, 995-996; see also *People v. Marks* (2003) 31 Cal.4th 197, 224 [The court declined "to impose the manifest need standard for the deployment of marshals inside the courtroom."]; *People v. Stevens* (2009) 47 Cal.4th 625 [In upholding the stationing of a deputy next to a testifying defendant, the Court reaffirmed that security measures that are not inherently prejudicial need not be justified by a demonstration of extraordinary need and noted that the use of security guards has become even more ubiquitous than when the United States Supreme Court determined their use was not inherently prejudicial in 1986].)

The court held a hearing about the increased security for Pineda. Counsel for Perez noted the presence of five deputy sheriffs as well as many as seven United States marshals or FBI agents and observed one officer was next to the witness. The court noted there were only four more uniformed officers than previously had been attending the trial and one of those officers would be testifying. The court agreed that several plain clothes officers were in the courtroom. The court's remarks reflect the court's implicit decision the presence of the additional officers was not unreasonable. (See *People v. Ainsworth* (1988) 45 Cal.3d 984, 1004.) In addition, even though the court did not

expressly state the increased security was justified, it seems evident it was because Pineda was a former high level gang member and an informant. One of the officers was placed next to the witness, not next to appellants. The court stated its belief the jury would not decide the case based on the security force present and would hear the witness was a high level member of the gang and thus would not be surprised by the presence of the additional officers.<sup>4</sup>

“Trial courts possess broad power to control their courtrooms and maintain order and security.” (*People v. Woodward* (1992) 4 Cal.4th 376, 385.) Thus, the court did not abuse its discretion in permitting the increased security even though no explicit threats had been made. (*People v. Stevens, supra*, 47 Cal.4th at p. 643.)

## **VI. CALJIC No. 8.72**

Appellant contends it was reversible error for the court not to give CALJIC No. 8.72 sua sponte as the court gave CALJIC No. 8.71 which provided that if the jury decided appellants had committed murder but had a reasonable doubt if the murder was first degree or second degree, it was to give them the benefit of the doubt and convict them of second degree murder, but failed to similarly instruct the jury that if it had a reasonable doubt as to whether the killing was murder or voluntary manslaughter, it was to convict them of voluntary manslaughter. (*People v. Dewberry* (1959) 51 Cal.2d 548, 554, 557.)

In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262-1263, the court determined another jury instruction fulfilled the same function as the instruction proffered by the defendant in *Dewberry*.

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<sup>4</sup> Officer Telis, who testified about another case involving witness Ramos, stated one of his duties was to keep witnesses out of the view of gang members.

In the case at bar, the court gave CALJIC No. 17.10, which provides in part: “If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of voluntary manslaughter is lesser to that of murder as charged in count 1.”

Appellants complain CALJIC No. 17.10 does not cure the failure to give CALJIC No. 8.72 because the former uses permissive language while the latter uses mandatory language. However, in *People v. Barajas* (2004) 120 Cal.App.4th 787, 793-794, the court concluded that since the trial court gave CALJIC No. 17.10, it did not err in failing to give CALJIC No. 8.72, reasoning: “The People argue that CALJIC No. 17.10 satisfies the requirements of *Dewberry*. We agree. CALJIC No. 17.10, when its blanks are filled in for murder and manslaughter, is logically equivalent to CALJIC No. 8.72. If a jury is convinced beyond a reasonable doubt that a defendant is guilty of either a greater or a lesser offense, this can only be because it has a reasonable doubt about elements of the greater offense and no reasonable doubt about any elements of the lesser. Under these circumstances, CALJIC No. 17.10 instructs the jury to convict of the lesser offense.”

### **DISPOSITION**

The judgments are affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**JACKSON, J.**